

Credits from the BSA.” (City of Wichita’s Responses to Interveners’ Production Requests dated December 7, 2018.)

4. On or around December 7, 2018 the City further acknowledged “consequently neither such a withdrawal nor the impact chloride migration was modeled as part of the City’s proposal because such an event is not contemplated by the City’s proposal.” (City of Wichita’s Responses to Interveners Interrogatories to City of Wichita, Interrogatory No. 24. December 7, 2018.)
5. The City submitted expert reports on February 15, 2019. The District and the Interveners submitted expert reports on February 18, 2019.
6. On March 11, 2019, the District filed a Motion in Limine seeking to exclude the City’s expert reports and the Interveners filed a motion in support of the District’s motion. (District’s Motion in Limine to Exclude Expert Testimony of the City dated March 11, 2019 and Interveners Motion in Support of Equus Beds GMD2’s Motion to Ensure Impartiality of Chief Engineer, Motion in Limine to Exclude Expert Testimony of City, Motion in Limine to Exclude Expert Testimony of DWR or Recommendations, Motion to Dismiss and Motion for Summary Judgment dated March 11, 2019.)
7. The Presiding Officer issued an Order on Prehearing Motions on July 24, 2019 (“July 24 Order”) ruling “the City must supplement each of its expert reports to provide the opinions and/or conclusions reached by each expert and a summary of the grounds for each.” The Order went on to say “GMD2’s motion to exclude the City’s expert reports is denied, *contingent upon* the supplementation described herein.” (Order on Prehearing Motions, July 24, 2019 p 28.) (*emphasis supplied.*)
8. On August 6, 2019, the Interveners and the District submitted a motion to continue the hearing in order to have “adequate time to evaluate the new information, share it with their respective experts for comment and otherwise prepare for hearing”. (ASR Status Conference Order August 9, 2019, p 3.)
9. The City filed supplemented expert reports on August 23, 2019 totaling over 800 pages.
10. On September 25, 2019, the District filed a Revised Motion for Summary Judgment based on Supplemental Discovery Answers Received from City.

11. On October 9, 2019, the Presiding Officer issued Prehearing Order on GMD2's Revised Motion for Summary Judgment Based on Supplemental Discovery Answers Received from City, denying the District's motion.

12. On October 10, 2019, the District filed a Motion for Reconsideration and for Leave to have additional motions considered out of time.

II. Motion for Reconsideration Analysis

A. Legal Standard for Summary Judgment

The Presiding Officer's July 24, 2019 Order on Prehearing Motions clearly articulated the legal standard for summary judgment in civil litigation as "the pleadings, the discovery and the disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

K.S.A. 60-256(c)(2). The Presiding Officer also stated these fundamental criteria are appropriate in this matter although the rules of civil procedure need not strictly apply. (Order on Prehearing Motions dated July 24, 2019.)

B. The District's Revised Motion for Summary Judgment asserts there is no genuine issue as to material fact, can be resolved prior to the scheduled hearing dates, and should be reconsidered.

Time pressures have confusingly been a driving force throughout this matter without a showing of need for expedience or actual harm caused by scheduling changes. The Parties all benefit by resolving the matter as efficiently and quickly as possible; however, the public interest is best served by allowing interested parties to be heard regarding those issues and topics appropriate for public comment. It is difficult to see how the public is served by strict adherence to a preselected date for a lengthy and expensive hearing on whether the proposed changes are likely to cause impairment if it has not first been established the City's proposed changes are allowed under Kansas Law. The District's Revised Motion for Summary Judgment attempts to serve the public interest by first addressing such preliminary issues with prehearing motions. The Intervenors believe the public interest is best served by full consideration of the District's Revised Motion for Summary Judgment Based on Supplemental Discovery Answers Received from City and Motion for Reconsideration.

The District's Revised Motion for Summary Judgment and subsequent Motion for Reconsideration are the direct result of a lengthy discovery dispute, whereby the City produced supplemental discovery documents on August 1, 2019; well after the discovery deadlines for discovery and prehearing motions.² A natural consequence of producing supplemental discovery months after the deadline is prejudice to other parties not receiving the benefit of timely responses and the potential need for additional motions after reviewing such supplemental discovery. The full extent of these consequences could not be assessed until the supplemental discovery was received and reviewed. Neither the public nor any party should be prejudiced by the additional time allowed the City to fully respond to discovery.

The District's Memorandum in Support of Revised Motion for Summary Judgment articulates how the City's proposal expands the consumptive use of water and is inconsistent with Kansas regulations on artificial recharge and aquifer storage. These issues are appropriate for summary judgment and best addressed by the Presiding Officer in advance of a formal public hearing. "Summary judgment is particularly appropriate where the facts are not disputed and the only questions presented are questions of law. (*Professional Lens Plan, Inc. v. Polaris Leasing Corp.* 238 Kan. 384, 390, 710 P.2d 1297 (1985)).

The Department of Agriculture, Division of Water Resources ("DWR") previously commented that "truncating the proceedings at this stage would jeopardize DWR's credibility as an agency as well as leave jilted those members of the public who might disagree with GMD2's and Intervenor's view regarding this matter." (DWR's Consolidated Response in Opposition to GMD2's and Intervenor's Motion to Dismiss and Motion for Summary Judgment, March 18, 2019 p 2). The credibility of all parties is best served by resolving questions of law prior to a full public evidentiary hearing. Members of the public would justifiably be frustrated or disappointed if they take time away from work, family and other activities in order to participate in a public hearing ultimately to learn the proposed modifications are not consistent with the Kansas Water Appropriation Act and its regulations.

In addition to the arguments raised by the District in the Memorandum in Support of Revised Motion for Summary Judgment, the City has not contemplated or studied the use of AMCs in the proposal or subsequent to the proposal. (City of Wichita's Responses to

² Previous deadline for discovery was January 7, 2019 and deadline for prehearing motions was March 11, 2019.

Intervenors' Production Requests No. 10 see also City of Wichita's Responses to Intervenors' Interrogatories to City of Wichita No. 24.) The purpose of the public hearing in part is to determine whether the AMC proposal meets "the requirements set forth in K.S.A. 82a-711, including that the proposed use will not cause impairment." (Prehearing Order dated May 1, 2019 p. 2.) The City acknowledges that withdrawal of the up to 120,000 acre-feet of AMCs has not been contemplated by the City and there are no documents related to such withdrawal. The City cannot meet its burden of proof to show the proposed changes to allow AMCs will not cause impairment if they have not contemplated the withdrawal of AMCs from the aquifer. The City alone bears the burden to show the withdrawal of the AMCs will not cause impairment. Summary judgment is appropriate because the City admitted they have only contemplated the accumulation and not the withdrawal or use of such credits. The public interest is best served by requiring the City to first gather the necessary information demonstrating the impact withdrawing AMCs will have on other water users. Advancing to a full hearing on the matter where the City is unable to meet its burden of proof is unfairly forces the public to incur the cost and expense of a public hearing.

C. The District's Motion for Reconsideration and Revised Motion for Summary Judgment based on Supplemental Discovery Answers Received from City avoids prejudice to the District, will not prejudice other parties, need not delay the hearing, and serves the public interest.

No party should be prejudiced by the additional time allowed the City to supplement its expert reports or fully respond to discovery requests for documents. The District's Revised Motion for Summary Judgment is based specifically on the supplementary discovery answers received from the City, pursuant to the Presiding Officer's July 24, 2019 Order on Prehearing Motions. The District has already been prejudiced by the delay in receiving this discovery information and should not be further prejudiced by the need to compel discovery.

The minimal burden imposed on other parties in responding to the District's Revised Motion for Summary Judgment is insignificant compared to the potential prejudice of not considering such a motion under the circumstances. The District's Revised Motion for Summary Judgment is a more limited version of the Motion for Summary Judgment already argued by the parties in May; therefore, responding to revised motion, even while preparing for the hearing, does not reach the level of prejudice. All parties have the potential to benefit from

resolving the questions raised in the District's Revised Motion for Summary Judgment prior to a full evidentiary public hearing. The District's Revised Motion for Summary Judgment could narrow the issues and limit the amount of preparation needed, potentially reduce the costs of expert testimony and potentially eliminate the need for the public hearing altogether. The benefits to considering the District's Motion for Reconsideration and Revised Motion for Summary Judgment is overwhelmingly in the public interest while also avoiding prejudice to the parties.

III. Motion to Consider Motions Out of Time Analysis

A. The Presiding Officer has discretion to consider motions out of time.

The Presiding Officer may exercise discretion to extend time for considering motions for good cause where a "party failed to act because of excusable neglect." (K.S.A. 60-206(b)). The Kansas Supreme Court found it proper "to allow a trial court some discretion in order to prevent a miscarriage of justice which might occur if blind adherence to set time periods were otherwise required." *Boyce v. Boyce* 206 Kan. 53, 55, 476 P.2d 625 (1970). The trial court, or the Presiding Officer in this matter, does this by a case by case analysis of the circumstances and effect upon all parties. Excusable neglect can be shown with evidence of good faith, a reasonable excuse and that justice will be served by granting additional time. (*Id.* at 56).

B. If the District's Motions are deemed out of time, the Intervenor's believe the District has shown excusable neglect and that justice will be served by considering the additional motions.

In *Boyce v. Boyce*, the Kansas Supreme Court considered excusable neglect and determined the "trial court should consider the circumstances under which the neglect to act occurred as well as the effect of an enlargement upon the rights of all parties affected thereby." *Boyce v. Boyce* 206 Kan. 53, 56, 476 P.2d 625 (1970). The current matter has included multiple scheduling changes, unforeseeable delays and large amounts of technical information provided well after previous agreed motion and discovery deadlines. These circumstances support the District's Motions are made in good faith to ensure justice is served and no parties are unduly prejudiced.

Reasonable confusion regarding deadlines and hearing schedules is a natural result of the multiple scheduling changes and delays. Various circumstances throughout the administrative process have necessitated scheduling changes in effort to ensure a fair process for all impacted parties. The burden and difficulty of prioritizing fairness is challenging and the Intervenors are grateful for the Presiding Officer's efforts in this regard. Following the July 24, 2019 Order on Prehearing Motions and August 9, 2019 Status Conference Order continuing the hearing, the Parties did not agree to a schedule containing the same specific deadlines as had been previously agreed in the December 21, 2018 Notice of Final Hearing Schedule ("December Notice"). The December Notice included specific deadlines for Close of General Discovery, Expert Reports, Pre-Hearing Motions and Pre-Hearing Briefs. This was a reasonable oversight in light of the mutual agreement to secure a hearing date in November or December; however, not a clear intention to preclude all future motions.

The contingent nature of the Presiding Officer's ruling on the Motion in Limine left the door open to further motions to consider whether the requested supplementation was provided. The July 24, 2019 Order on Prehearing Motions clearly stated "GMD2's motion to exclude the City's expert reports is denied, contingent upon the supplementation described herein." (Order on Prehearing Motions, July 24, 2019 p 28.) The language of the order makes clear the possibility that the City might not to provide the requested supplementation. The District's Renewed Motion in Limine to Exclude Expert Testimony of the City filed on October 10, 2019 raises the issue of whether the Supplemented Expert Reports filed by the City met the specific contingency included in the Presiding Officers ruling. It is appropriate and the natural result of a contingent ruling that the adequacy of the Supplemented Expert Reports be reviewed prior to the public hearing.

The City produced additional documentation in the form of compelled discovery, months after the close of discovery and supplemented expert reports more than six (6) months after the deadline for expert reports. The highly technical nature of the supplemented expert reports and lengthy, unmarked attachments made for a challenging review to be accomplished in a short period of time. In addition to adding multiple attachments the City included new opinions in the form of rebuttal expert testimony to the supplemented reports. The City's actions created a circumstance where a mere 30 days was not adequate to review, analyze and respond. The

Intervenors appreciate the District was able to conduct a thorough review of the City's Supplemented Expert Reports as quickly as they were able.

C. Considering additional motions out of time serves the public interest and reduces prejudice to parties receiving supplemental information.

It is reasonable and fair to allow responsive motions following the supplemented expert reports. The matter is highly technical making expert reports an important and critical aspect of the public hearing. The introduction of newly supplemented expert reports well after the initial deadline, without an opportunity to review and file responsive motions disadvantages the Intervenors and other parties and is the reason a continuance was requested in August.

Considering additional motions out of time is just, serves the public interest and imposes minimal prejudice to the parties. The District's Motion to have Additional Motions Considered Out of Time seeks to reduce prejudice rather than cause prejudice to any party. The District's Renewed Motion in Limine to Exclude Expert Testimony of the City is appropriate and important due to the contingent denial of the previous motion. Consideration of the motion also serves the purpose of narrowing issues for the public hearing allowing all parties and the public to more efficiently prepare. The potential reduction in expert testimony for failure to correct issues identified in the July 24, 2019 Order on Prehearing Motions would lead to a more efficient hearing, improve the ability of all Parties to prepare and potentially reduce the amount of time members of the public need to spend away from work attending the hearing. The Presiding Officer graciously allowed the City additional time to correct the identified errors.³ Any prejudice to the City for failing to correct such errors is minimal when compared to the potential prejudice to other parties in allowing such incomplete reports introducing new rebuttal testimony without adequate opportunity for responsive motions.

IV. Conclusion

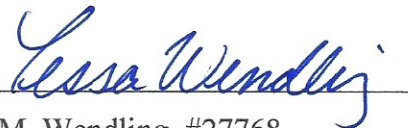
³ "there appears to be no identification in the referenced reports, ASR proposal, its attachments, or cover letter specifying any individual expert's observations and opinions. The reports are replete with factual information on which the experts have relied, but the reports do not identify the respective observations, opinions or conclusions of any given expert." (July 24, 2019 Order on Prehearing Motions).

IV. Conclusion

The District's Motion for Reconsideration and for Leave to have Additional Motions Considered Out of Time reduces prejudice to the District, Intervenors and potentially others, while also serving the public interest by convening a public hearing on only those issues where an evidentiary public hearing is appropriate. The District has demonstrated excusable neglect in filing motions that might be considered out of time and that other parties will not be significantly prejudiced by such motions. The potential benefits of properly addressing these prehearing matters significantly outweigh any inconvenience and with cooperation of the parties can potentially be accomplished without need for further continuance.

The Intervenors respectfully ask the District's Motion for Reconsideration and for Leave to have Additional Motions Considered Out of Time be granted.

Respectfully submitted,

By: 

Tessa M. Wendling, #27768
1010 Chestnut St.
Halstead, KS 67056
(773) 459-8147
twendling@mac.com
Attorney for Intervenors

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that a true and correct copy of the above was served by electronic mail on this 30th day of October, 2019, for filing, to ConnieOwen@everestks.net and served the same upon counsel for the other parties herein by electronic mail addressed to:

City of Wichita Department of Public Work & Utilities
455 North Main Street
Wichita, Kansas 67202
Brian McLeod bmcleod@wichita.gov

Equus Beds Groundwater Management District No. 2
313 Spruce
Halstead, Kansas 67056
Thomas A. Adrian tom@aplawpa.com
Leland Rolfs Leland.rolfs@sbcglobal.net
David J. Stucky Stucky.dave@gmail.com
Tim Boese tboese@gmd2.org
Allison Graber agraber@aplawpa.com

Division of Water Resources
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502
Aaron Oleen Aaron.oleen@ks.gov
Stephanie Murray Stephanie.Murray@ks.gov



Tessa M. Wendling #27768
Attorney for Intervenors